SUPREME COURT, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 92

SERVICE STORAGE AND TRANSFER CO., INC., *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

**On Writ of Certiorari to the Supreme Court of Appeals of Virginia**

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

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### PRELIMINARY STATEMENT

Petitioner, Service Storage and Transfer Co., Inc., submits this, its reply to the briefs filed on behalf of Respondent, the Commonwealth of Virginia and Amicus Curiae, The National Association of Railroad and Utilities Commissioners.

## THE CONTENTIONS OF RESPONDENT AND AMICUS

The contentions of the Respondent and those of Amicus Curiae, in all essential respects are identical and the relevant propositions asserted by either or both may be briefly summarized as follows:

(a) That the questioned operations of petitioner involving, as they do on some occasions, the using of circuitous routes through a sister state constitute a subterfuge and an evasion of state law.

(b) That the questioned operations involve shipments moving between points in Virginia that could have moved over more direct highways wholly located in Virginia and that the transportation is therefore intrastate and subject to state regulation.

(c) That neither petitioner's interstate certificate nor the report of the Interstate Commerce Commission in *Service Storage and Transfer, Inc.—Petition for Declaratory Order,* 71 M.C.C. 304, interpreting petitioner's certificate authorize the questioned operations.

(d) That state authorities may with finality determine whether a motor carrier's operations are interstate in character.

(e) That the provisions of section 202(b) and section 216 (e) of Part II of the Interstate Commerce Act reserve to the several states jurisdiction over the operations of the type in question.

(f) That even if the questioned operations are in fact interstate, that the Commonwealth of Virginia should be permitted to assume jurisdiction over them because of their "local character" in order to enable the state to protect "intrastate haulers" and "the public in Virginia".

## ARGUMENT IN REPLY

*Reply to propositions (a) and (b)*

### (1) The Questioned Operations Are Bona Fide and the Circuity in Highway Mileage is Immaterial

Contrary to the position assumed by the Commonwealth of Virginia and the National Association of Railroad and Utilities Commissions, there is really no question as to whether shipments moving from Virginia origins to Virginia destinations through Bluefield, West Virginia, are in fact interstate in character. Both the definition of interstate commerce, as that term is used in Section 203 (10) of Part II of the Interstate Commerce Act, and the decisions of this Court, foreclose argument on that point. As Justice Frankfurter stated in *Central Greyhound* v. *Mealy*, 334 U.S. 653, 655:

> "It is too late in the day to deny that transportation which leaves a state and enters another state is 'commerce . . . among the several states' simply because the points from and to are in the same state".

citing, *Hanley* v. *Kansas S.R. Co.*, 187 U.S. 617 and *Western Union Telegraph Co.* v. *Speight*, 254 U.S. 17. The question then is whether petitioner's interstate operations between points in Virginia are performed in such a way as to compel the conclusion that although interstate as a matter of fact they should be held to be intrastate as a matter of law. Petitioner has consistently contended throughout the course of this litigation that its interstate certificate as construed by the Interstate Commerce Commission disposes of the latter issue. The Interstate Commerce Commission's report interpreting petitioner's certificate forecloses inquiry by the state on the issue at this time because it has

been established as a matter of law, that the questioned operations are bona fide and authorized by the carrier's certificate.

Even assuming, however, that state authorities may through the institution of proceedings in its own forums, collaterally attack an order of a Federal agency, and assuming that a state is entitled to test the bona fides of a Federally certificated motor carrier's operations, the record evidence in this proceeding does NOT permit the inference that petitioner's operations have been conducted in bad faith.

Petitioner agrees with Amicus that there is not "any dispute concerning the facts in the case". Petitioner, however, asserts that many significant, uncontradicted, evidentiary facts have been ignored both by respondent and amicus in the formulation of their arguments. In the Commonwealth's attempt to distinguish *Western Union Telegraph* v. *Speight*, 254 U.S. 17 (respondent's brief, page 13) it argues that factual differences render that decision inapposite here. The Commonwealth points out, for example, that in the case cited the arrangements developed by Western Union to transmit messages between North Carolina points through Richmond, Virginia had been in existence for many years and that the operational plan followed by the telegraph company was operationally more convenient and more economical. In its attempt to distinguish factually the *Western Union* case, the Commonwealth fails to take into consideration the uncontradicted testimony of the only witness that presented evidence with respect to the physical operations performed by petitioner in moving traffic between Virginia points. For example, it completely ignored the following testimony (R. 42-43):

Q. Will you state, Mr. Echard, as it relates to your operations, what effect, if any, does circuity in the operation, some excess mileage, as reflected in the exhibit, what effect that has on the feasibility or practicability and profitability of your company's operations.

A. Even though we could take a more direct route if we were going to move a shipment from one point to another point, the feasibility of it is to move freight into the "break bulk point" and fan out from that point the freight going to other areas, combining freight from Charleston, Covington, Beckley, and Roanoke at Bluefield and moving it into the Bristol terminal for handling there.

Q. In other words, do I understand your testimony to mean that, because there is a volume of less truckload traffic, you can handle other shipments without making your shipments unprofitable or impractical?

A. Yes. If you could move it down 11 from Roanoke to Bristol, which we can't do legally, but if we could, so far as our operation is concerned, it would give better service to move it through Bluefield because of the flow of freight.

Q. What do you mean by "flow of freight"? Do you mean the flow of freight from Bluefield?

A. We have 4,000 pounds from Roanoke to Bristol, for example, and we move that 4,000 pounds with other freight in trailer loads to points west and southwest to Bluefield, and when you get to Bluefield that 4,000 pounds will move in conjunction with other freight we combined to Bristol in truckloads.

Q. And if it were to move directly from Roanoke to Bristol, it would move simply as a 4,000 pound shipment?

A. It would move as a 4,000 pound shipment, or you could not move it until you had another shipment, which would delay the shipment.

Q. There would not be enough traffic to justify the operation?

A. That is my view.

Ignored also is the fact that the questioned operations were performed for a period of more than four years in precisely the same manner that they were conducted at the time that the Virginia authorities instituted prosecution (R. 39).

The situation as described by Witness Echard shows that petitioner here, like the telegraph company in *Western Union* v. *Speight*, had not only conducted the questioned operations for many years, but in addition showed by uncontradicted evidence that the method of handling the traffic in question was more convenient and less expensive for the company.

Other important facts supported by the record, but ignored by Respondent and Amicus, include the following:

1. That the shipments moving between Virginia points were transported in the same vehicle used to transport traffic moving between Virginia and West Virginia. (R. 37-38)

2. The circuity in operation between Virginia origins also exists in operations conducted between Virginia and West Virginia (Exhibit 5—R. 105).

3. That patrons of petitioner's service know that the service was performed through another state. (R. 70)

As Exhibit 5 demonstrates, circuity in operation is not unusual in petitioner's other interstate operations nor is it unusual in the transportation industry generally whether the mode of transportation be rail,

water, air or motor. The feasibility, practicability or profitability of a transportation business is not tested by the layman's standard employed by respondent but rather by whether "the flow of freight" (R. 42) requires handling pursuant to a convenient, efficient and economical plan devised by the transportation company.

Respondent has failed to distinguish *Western Union* v. *Speight* which we consider controlling on the issue of bona fides. More significantly, it has ignored completely other telegraph cases, including those of its own highest court, the Supreme Court of Appeals of Virginia.

In *Western Union Telegraph* v. *Bowles,* 124 Va. 730, the transmission of a telegraph message from Bassett, Virginia to Martinsville, Virginia, through North Carolina points was held to be interstate precisely for the reason urged here by petitioner. That transaction was described by the Virginia Supreme Court of Appeals as follows (732):

> "Following the method then, and for some years theretofore, in the regular use by the Company, this message was forwarded from Bassett to Richmond over a direct wire but passes through two telegraph offices in North Carolina before it reaches Richmond, the relay point for messages coming into the territory in which Martinsville is situated. This wire passes through the Martinsville office, but is not designed for direct use there. From Richmond, the message, like all others of its class, was sent over another direct wire, which run through two other North Carolina offices before reaching Martinsville. The agent at Bassett testified that the messages could have been sent direct to Martinsville, but that the route by which he did send it was the one which afforded the quickest service to patrons, and was the one in

regular use under the practice and requirements of the company. This testimony is not in any way disputed or contradicted."

The Supreme Court of Appeals of Virginia also stated (733):

> "That the interstate character of the message must be tested by the actual facts as to its transmission and not by the motives of the company" * * * and that "the adoption by the company of an interstate route of transmission relegated the transaction to the domain of federal control".

Recognizing the danger of a lay approach to operations conducted by a telegraph company, the Court later stated (734):

> "If only the patrons of the company at Bassett and Martinsville were concerned, there would seem to be little doubt, certainly to a mind unfamiliar with the art of telegraphy and untrained in its practical use, that the best and quickest way to serve these two points would be by the use of a direct instead of a circuitous line. But the company serves a vast territory and a multitude of patrons, and in doing so maintains a large organization and a complex system, which it is by law required to so direct and control as to best and most efficiently serve the general public. If it is failing in its duty in this respect as to messages of the kind here involved, the question is one with which (whether unfortunately or not) the State cannot deal for the reasons already set out."

## *Reply to Proposition (c)*

### (2) Petitioner's Certificate and the Declaratory Order of the Interstate Commerce Commission Specifically Authorize the Questioned Operations

Both respondent and amicus contend that petitioner's certificate does not authorize the operation in question. They also contend that the *declaratory report* issued by the Interstate Commerce Commission interpreting petitioner's certificate does not in fact authorize petitioner to conduct the operations in question. They criticize petitioner for resorting to the Interstate Commerce Commission after proceedings had been instituted by and hearing held before the Virginia State Corporation Commission. The fact is that petitioner appealed to the Interstate Commerce Commission for a definitive interpretation of its certificate because, during the course of hearing before the Virginia Commission, it was made clear by members of that Commission that they were unwilling to accept either the informal interpretation of that certificate issued by the Interstate Commerce Commission's field staff and/or its Director of the Bureau of Motor Carriers and were also unwilling to accept the rule of decision expressed by the Interstate Commerce Commission in *Atlantic Freight Lines, Inc.—Interpretation of Certificate,* 51 M.C.C. 175. Although Amicus also suggests that the Interstate Commerce Commission's declaratory report was issued "solely upon the allegations submitted by the Petitioner" it fails to recognize that a copy of that petition was served on appropriate state officials and that upon receipt thereof, the state could have become a party, requested hearing and assumedly introduced evidence in support of its position.

Both respondent and amicus fail to include in their briefs any reference to or discussion of *Atlantic Freight Lines, supra,* although petitioner throughout the course of this litigation has relied heavily, not only on the decision reached therein, but the complete illumination of the problem and the rationale supporting the Commission's ultimate conclusions. Curiously enough, respondent refers this Court to *Atlantic Freight Lines* v. *Pennsylvania P.U.C.,* 60 Atl. 2nd 589, wherein it was held by the Pennsylvania court that operations conducted between Pennsylvania points through Baltimore, Maryland were not interstate. Had respondent traced the history of that proceeding to its conclusion and considered it in the light of *Atlantic Freight Lines, Inc.—Interpretation of Certificate, supra,* it would have found that the Pennsylvania P.U.C. participated in latter case before the I.C.C. and that subsequent to the Interstate Commerce Commission's definitive interpretation of the certificate of Atlantic Freight Lines, Inc., Pennsylvania officials subscribed to the Interstate Commerce Commission's interpretation and entered into a stipulated agreement, the result of which now permits Atlantic Freight Lines to conduct operations between points in Pennsylvania so long as the transportation is performed over an interstate route of movement and in accordance with the carrier's interstate certificate. Attached hereto as an appendix there is a copy of that stipulation.

Petitioner further asserts that respondent may not in a proceeding of this character attack collaterally petitioner's interstate certificate nor, may it criticize or attempt to interpret the Federal agency's declaratory order, particularly since after appropriate invitation it chose not to become a party to the proceeding leading the issuance of the interpretation report.

*Reply to Proposition (d)*

**(3) State Authorities May Interpret Orders of Federal Agencies But That Action is Necessarily Reviewable in Federal Forums**

The Commonwealth of Virginia rejects Petitioner's suggestion that it would have been more appropriate for the state authorities to invoke the jurisdiction of the Interstate Commerce Commission under the provisions of Section 204 (c) of Part II of the Interstate Commerce Act. Petitioner has never contended that the states are compelled so to do but in the light of this Court's decision in *Castle* v. *Hayes Freight Lines,* 348 U.S. 61, it is now clear that where concurrent jurisdiction may exist, the sound approach is through the Federal forum. The testing of federal orders in state forums necessarily involves the risk of invalidating a federal order through collateral attack. On this point, we may properly resort to the opinion of the Interstate Commerce Commission in *Atlantic Freight Lines, Inc.—Interpretation of Certificate, supra,* the Commission there stated:

> "* * * that primary jurisdiction to determine the bona fides of interstate transportation is vested in this Commission." 51 MCC 186.

As authority for its action the Interstate Commerce Commission referred to the opinion of the Superior Court of Pennsylvania in *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utilities Commission, supra,* wherein it was held:

> "That the question of what is interstate commerce is one of fact; that since enactment of the Motor Carrier Act of 1935, the conclusive determination of that fact is vested in this Commission; that when this Commission has determined that

certain transportation is bona fide interstate transportation, no state commission or court may thereafter collaterally attack such finding in another proceeding; but, where this Commission has not determined the question, the State Commission or court must use its best judgment in initially doing so." 51 MCC 178.

Had the Commonwealth of Virginia resorted to the federal commission in the first instance or later intervened in the declaratory order proceeding, this Court would have before it a proceeding involving direct review of an Interstate Commerce Commission order instead of review of that same order through collateral attack. Petitioner contends that this Court should insist that attacks on Interstate Commerce Commission orders be limited to the procedure prescribed in Title 28, U. S. Code Sections 1336, 2321-2325, and 2284. *Texas and P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 553.

*Reply to Propositions (e) and (f)*

**(4) Assuming, Arguendo, That the Operations in Question Have Local Aspects, Neither the Interstate Commerce Act Nor Other Authority Permit Their Control and Regulation by the Commonwealth of Virginia**

The operations in question of petitioner are by definition, fact and law interstate commerce. However, even accepting the premise advanced by respondent and amicus curiae, that such operations involve "local" or intrastate aspects, there is no statutory or other authority which permits their regulation by a state instrumentality.

In support of the position that petitioner's operations are so local in nature as to require state regulation, respondent and amicus curiae rely on the language

of sections 202(b) and 216(e) of Part II of the Act. Section 202(b) limits the Act to operations in interstate commerce, while a proviso of section 216(e) bars the Commission from regulating intrastate transportation as to rates, fares, charges or service in connection therewith. The provisions of the sections referred to relate to intrastate commerce only. Here, petitioner's operations, as stated earlier, are in interstate commerce both by statutory definition and by virtue of an Interstate Commerce Commission order. Therefore, it follows that both section 202(b) and section 216(e) are wholly inapplicable. This same point was raised in *United States* v. *Capital Transit Co.*, 325 U.S. 357 (1945) and again in *United States* v. *Capital Transit Co.*, 338 U.S. 286 (1949). In the former case, Capital Transit in seeking to avoid rate regulation of its District of Columbia-Virginia service by the Interstate Commerce Commission, contended that Commission jurisdiction was precluded by the exemption in section 216(e). After holding that the service involved was "interstate transportation" the Court found that the exemption in section 216(e) was expressly made inapplicable.

The second *Capital Transit* case contains even more conclusive authority for the rejection of respondent's "intrastate aspects" contention. For there, the parties (including the Commonwealth of Virginia) that opposed federal jurisdiction relied, inter alia, upon *Connecticut Light and Power Co.* v. *Federal Power Commission*, 324 U.S. 515, and *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 907, just as respondent and amicus curiae do. The inapplicability of *Connecticut Light* and *Panhandle* to the facts in the case at bar seems manifest because this

Court's opinion in the second *Capital Transit* case does not make even fleeting reference to them.

One additional point raised by Amicus requires comment. In pressing its "local aspects", ergo, "local control" argument, Amicus (at page 13 of its brief) gratuitously infers in the complete absence of record evidence, that the action of the Commonwealth would "protect" or otherwise benefit "intrastate haulers" and the "Virginia shipping public". Had there existed intrastate haulers in the territory and had they suffered injury, the Commonwealth of Virginia had it within its power to introduce evidence thereon. Had the shipping public of Virginia been prejudiced by petitioner's operations, evidence thereof was not adduced and it is wholly improper to indulge in such presumption. If the evidence in this case permits any inference on the matter, it is that the shipping public of Virginia has used voluntarily petitioner's service, knowing it to be provided over sometimes circuitous routes. Their past continued use of that service implies a continuing need therefor and strongly suggests the non-availability of adequate intrastate motor carrier service. If petitioner's weekly revenues of approximately $500 (Exhibits 7 & 8—R. 106-107) is important to the continued economic health of the alleged but unidentified intrastate haulers, it appears that they could easily capture the traffic involved by providing the "quicker service" that this Court is asked to assume could be provided over the "normal, regular, or usual route".

Congress in permitting interstate carriers to perform services between two points in the same state through a sister state after the carrier obtained authority from the Interstate Commerce Commission was not unmind-

ful of the effect on local haulers. Accordingly it provided in the second proviso of Section 206(a)(1) that intrastate carriers authorized by state officials to conduct intrastate operations would be permitted to obtain automatically from the Interstate Commerce Commission co-extensive interstate authority. That provision it seems to us strikes an equitable balance between interstate carriers and intrastate carriers.

## CONCLUSION

Petitioner submits that the arguments advanced by respondent and amicus are untenable and that accordingly the relief requested by petitioner in its opening brief should be granted.

Respectfully submitted

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## APPENDIX

C. P. Dauphin County

Equity Docket No. 2008

C. D. No. 267

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

ATLANTIC FREIGHT LINES, INC.

### STIPULATION

AND Now, this 27th day of July, A. D., 1955, it is hereby stipulated and agreed by and between the parties to the above styled cause that the Court shall and may enter the following decree.

(s) HARRIS LATTA
(s) JOSEPH NISSLEY
*Attorney for Atlantic Freight Lines*

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C. P. Dauphin County

Equity Docket No. 2008

C. D. No. 267

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

ATLANTIC FREIGHT LINES, INC.

### DECREE

AND Now, this 27th day of July, 1955, upon the consent of the parties to the above styled cause, and upon consideration of the pleadings filed and proceedings heretofore had therein, the plaintiff having exhibited its complaint, as

amended, asking relief touching the matters therein particular complained of and set forth at length, and preliminary objections to the complaint having been determined, and answer having been filed by defendant, and the parties, including intervenors, having agreed that the matter shall be disposed of by the entry of a consent decree.

NOW THEREFORE, IT IS ORDERED, ADJUDGED, DECREED AND FINALLY DETERMINED that defendant, Atlantic Freight Lines, Inc., be, and hereby is, enjoined from transporting freight, as a common carrier by motor vehicle, or otherwise, between points in Pennsylvania, except such transportation in interstate commerce as may be authorized by operating authority from the Interstate Commerce Commission and which in fact moves over an interstate route of movement; it being the intent of this decree to prohibit absolutely any transportation of freight by defendant between points in Pennsylvania in intrastate commerce over a route of movement lying wholly within the Commonwealth of Pennsylvania, but to impose no restriction whatsoever upon defendant with respect to transportation in interstate commerce between points in Pennsylvania which defendant is authorized to serve by operating authority from the Interstate Commerce Commission and which transportation in fact moves over a route of movement so authorized by the Interstate Commerce Commission and lying partly within and partly without the Commonwealth of Pennsylvania.

(s) WALTER R. SOHN
J.

We consent to the entry of the foregoing decree.

(s) HARRIS LATTA
(s) JOSEPH NISSLEY
*Attorney for Atlantic Freight Lines*